CAUSE NO. D-1-GN-06-002209

JANE DOE, Individually, and As Next of Friend of JULIE DOE, a Minor;	§	**IN THE DISTRICT COURT OF**
Plaintiffs,	§	
vs.	§	**TRAVIS COUNTY, TEXAS**
MYSPACE, INC.; NEWS CORPORATION; and PETE I. SOLIS,	§	
Defendants.	§	**261ST JUDICIAL DISTRICT**

BRIEF IN SUPPORT OF FIRST AMENDED SPECIAL EXCEPTIONS

Plaintiffs Jane and Julie Doe allege that 19 year-old Pete Solis sexually assaulted 14 year-old Julie Doe while the two were on a date. According to Plaintiffs' First Amended Original Petition, Julie Doe and Pete Solis met online at MySpace.com, exchanged phone numbers, and had multiple telephone conversations during which they arranged the date that led to the alleged sexual assault. Plaintiffs' suit attempts to hold the owners of MySpace.com liable for the alleged criminal conduct of Pete Solis. Plaintiffs' claims against MySpace fail as a matter of law because the Communications Decency Act of 1996 ("CDA") bars each cause of action that Plaintiffs attempt to allege. Texas law also bars Plaintiffs' claims against MySpace because: (a) there is no duty to prevent third parties from committing crimes; (b) the alleged sexual assault was a "new and independent cause" of Plaintiffs' injuries; and (c) Plaintiffs cannot claim to have relied on alleged misrepresentations that contradict the unambiguous terms of the MySpace.com Terms of Use Agreement. For these reasons, and because Plaintiffs have already once attempted to replead the causes of action against MySpace, MySpace respectfully requests dismissal under Rule 90 of all claims asserted against them.

Dockets.Justia.com

I.
BACKGROUND

A. MySpace.com and Social Networking Web sites

MySpace.com is the most visited web site in the United States, ahead of long-time marquee web sites like Yahoo, MSN, eBay, and Google.[1] MySpace.com is owned by Defendant MySpace, Inc., a company in the corporate family of Defendant News Corporation (collectively "***MySpace***").

Commonly referred to as a "social networking web site," MySpace allows its users to create online "profiles," which are individual webpages on which users post photographs, videos, and information about their lifestyles and interests.[2] The idea of online social networking is that users will use their online profiles as a vehicle to become part of an online community of people with common interests. Once a user has created a profile, she can extend "friend invitations" to other MySpace users and communicate with her friends and other MySpace users over the MySpace platform via e-mail, instant messaging, or blogs.[3] The MySpace platform also allows users to assemble around common interests through its user groups, which cover topics like film, travel, government, politics, and sports.[4] Actors, musicians, comedians, and politicians also create user profiles to publicize themselves and interface with fans.[5] MySpace users interested in meeting friends within a certain geographic area can use the site's browse feature to search for users whose profiles meet various criteria. MySpace.com is free to users. All MySpace.com members must agree to the MySpace Terms of Use Agreement.[6]

---

[1] *See* First Am. Pet. at ¶ 9 (citing Bill Tancer, *MySpace Moves Into #1 Position for all Internet Sites*, Hitwise Intelligence Analyst Blogs (July 11, 2006), http://weblogs.hitwise.com/bill-tancer/2006/07/myspace_moves_into_1_position.html.

[2] *See id.* at ¶ 12, *see also* Exhibit A, MySpace Terms of Use Agreement, May 1, 2006, cited and incorporated by reference in Plaintiffs' First Am. Pet. at ¶ 27.

[3] *See* First Am. Pet. at ¶ 12.

[4] *See* Exhibit B, Saul Hansell, *For MySpace, Making Friends Was Easy. Big Profit Is Tougher*, N.Y. Times, Apr. 23, 2006 (cited in footnotes 3, 5-7, and 9 of Plaintiffs' First Am. Pet.).

[5] *Id.*

B. MySpace Safety Measures for Young Teen-Users

As Plaintiffs allege, the MySpace community is open to users age 14 and over.[7] To limit contact between young teens and adult users they do not know, 14 and 15 year-old users' profiles are set to "private" by default, which restricts the amount of information that can be seen on a teen-user's profile by users who are not in that teen-user's friends network. Additionally, adult users cannot send private or instant messages to the 14 or 15 year-old unless the teen gives the user permission to send such communications by "accepting" a friend request from the adult user.[8] But as set forth in the MySpace "Tips for Parents," which Plaintiffs cite in their First Amended Petition, these protections are automatically applied only to the profiles of users who represent themselves to be 14 or 15 years old:

> Kids shouldn't lie about how old they are. MySpace members must be 14 years of age or older. *We take extra precautions to protect our younger members and we are not able to do so if they do not identify themselves as such.* MySpace will delete users whom we find to be younger than 14, or those misrepresenting their age.[9]

As discussed below, these warnings and prohibitions are echoed in the MySpace Terms of Use Agreement as well as in several of the news publications that Plaintiffs cite in their First Amended Petition.[10]

---

[6] *See* Exhibit A, MySpace Terms of Use Agreement, May 1, 2006.

[7] *See* First Am. Pet. at ¶ 11.

[8] *See id.*

[9] *See* Exhibit C, MySpace Tips for Parents, cited and incorporated by reference in the First Am. Pet. at ¶ 27.

[10] *See* Exhibit D, Julia Angwin & Brian Steinberg, *News Corp. Goal: Make MySpace Safer for Teens*, Wall St. J., Feb. 17, 2006, at B1 ("The company says it has a computer program that checks for clues that users might be lying about their age and has removed 200,000 profiles as a result. Like other sites, MySpace doesn't

C. Julie Doe Creates MySpace Profile by Misrepresenting Her Age

Unfortunately, according to Plaintiffs' First Amended Petition, Julie Doe ignored these prohibitions and created a MySpace profile when she was only 13 years old.[11] Specifically, Julie Doe bypassed the MySpace safety protocols by representing herself to be 19 years old, so that none of the protections that MySpace has in place for its younger members were applied to her account. Accordingly, Pete Solis and other 19 year-olds were able to send Julie Doe e-mails through the MySpace system. Notwithstanding that she lied about her age, Julie Doe agreed to be bound by the MySpace Terms of Use Agreement, which makes clear that MySpace cannot verify the age or identity of its users and cautions its users never to provide "telephone numbers, street addresses, last names, URLs, or e-mail addresses" to other users.[12]

D. Julie Doe Allegedly Meets Pete Solis on MySpace and Plans a Date with Him

According to Plaintiffs' First Amended Petition, Pete Solis initiated contact with Julie Doe through MySpace.com on April 6, 2006.[13] Plaintiffs also allege that Julie Doe provided Pete Solis with her cell phone number and that she had several conversations with Pete Solis

---

verify users' ages. 'No one on the Internet with a free site has ever come up with a way to do that,' Mr. DeWolfe says."); Exhibit E, John Moritz, *Texas AG Wants Web Sites to Protect Young Users*, Fort Worth Star-Telegram, May 23, 2006 ("A message in the 'tips for parents' section reads: 'We take extra precautions to protect our younger members and we are not able to do so if they do not identify themselves as such.'"); Exhibit F, *MySpace.com to Bolster Security Measures*, Reuters Limited, March 3, 2006 ("But DeWolfe said that the system [of restricting access to 14 and 15 year-olds] is not foolproof and that no Web site has developed technology to verify the age of all users reliably."); Exhibit G, Jessi Hempel, *From MySpace to Safer Place?*, Business Week, April 11, 2006 ("As it stands, children under 14 aren't allowed to create profiles, though many children below that age lie about their age and create profiles anyway.").

[11] *See* First Am. Pet. at ¶ 30.

[12] *See* Exhibit A, MySpace Terms of Use Agreement, May 1, 2006, at § 8.6.

[13] *See* First Am. Pet. at ¶ 31.

over the telephone.[14] At some point, the two arranged to meet for a date on May 12, 2006, and it is during that date that Plaintiffs allege Pete Solis sexually assaulted Julie Doe.[15]

E. Julie and Jane Doe Sue MySpace

Following the events of May 12, 2006, Julie Doe and her mother, Jane Doe, sued MySpace seeking $30 million in damages. Despite Julie Doe's creation of a false profile and her deliberate violation of MySpace's Terms of Use Agreement, Plaintiffs allege that MySpace was negligent and grossly negligent for failing its duty to "substantially decrease the likelihood of danger and harm that MySpace posed" to Julie Doe.[16] And despite the Terms of Use Agreements and Tips for Parents page, Plaintiffs also allege that MySpace committed fraud, negligent misrepresentation, and fraud by nondisclosure for misrepresenting to the public "that MySpace was safe for young underage MySpace users."[17]

F. The First Amended Petition is Plaintiffs' Second Failed Attempt to Assert a Viable Cause of Action Against MySpace

Both MySpace, Inc. and News Corporation were served with Plaintiffs' Original Petition on June 30, 2006 alleging five causes of action against MySpace: (a) negligence, (b) gross negligence, (c) fraud, (d) fraud by nondisclosure, and (e) negligent misrepresentation. MySpace timely filed its Original Answer and Special Exceptions on July 24, 2006, wherein it specially excepted to seven defects in the form and substance of Plaintiffs' Original Petition. Before setting its special exceptions for hearing, MySpace invited Plaintiffs to replead their Original

---

[14] *See id.* at ¶ 32.

[15] *See id.* at ¶ 33.

[16] *Id.* at ¶ 46.

[17] *Id.* at ¶ 59.

Petition so as to state a viable cause of action against MySpace.[18] On August 10, 2006, Plaintiffs filed their First Amended Original Petition and Response to MySpace's Special Exceptions. While Plaintiffs were able to correct some of the technical defects in the Original Petition, they continue to assert the original five substantive claims against MySpace, all of which remain fatally flawed. Because Plaintiffs have already attempted unsuccessfully to correct the defects in their claims against MySpace, the Court should dismiss their claims against MySpace for the reasons set forth below.

II.
ARGUMENT

Plaintiffs' claims against MySpace fail as a matter of law because they seek to hold MySpace liable for the alleged criminal acts of Pete Solis, a teenager who has no relationship with MySpace other than having been one of the now 106 million users worldwide who have had online profiles on MySpace.com. Several well-settled principles of federal and state law bar such claims. First, under the Communications Decency Act of 1996, MySpace is immune from suit for any cause of action based on claims arising from the online communications and offline actions of its users. Second, Plaintiffs have failed to state a claim for negligence or gross negligence because MySpace has no legal duty under Texas law to prevent a third party from committing a criminal act. Third, Plaintiffs have failed to state a claim against MySpace under any cause of action because Pete Solis's alleged criminal act was a new and intervening cause of Plaintiffs' injuries. And fourth, Plaintiffs have failed to state a claim for fraud, negligent misrepresentation, or fraud by nondisclosure because Plaintiffs have plead facts that legally preclude them from justifiably relying on MySpace's alleged misrepresentations regarding the safety of the site, including its ability to verify the age or identity of its users. For these reasons, Plaintiffs have not, and cannot, state a viable cause of action against MySpace.

---

[18] *See* Exhibit H, July 24, 2006, Letter from Michael D. Marin to Plaintiffs' Counsel.

A. MySpace Is Immune from Plaintiffs' Suit Under the Communications Decency Act of 1996

Plaintiffs' claims against MySpace are barred under the Communications Decency Act of 1996, 47 U.S.C. § 230 (the "***CDA***" or "***Act***"). It is well-settled that the CDA immunizes "interactive computer services" like MySpace from suits based on the online communications or related offline behavior of its users. That is, even if Julie Doe actually met Pete Solis through MySpace.com, the CDA bars Plaintiffs from suing MySpace for any harm suffered as a result of Pete Solis's online statements or alleged criminal assault. Furthermore, the CDA immunizes MySpace from suits based on the effectiveness of its voluntary safety measures that restrict access to its teenage users' content. To encourage web site operators to self-police their sites, the CDA's "Good Samaritan" provision bars users from filing suits claiming that a web site failed to effectively implement a voluntary safety feature. Because MySpaces's safety features limiting the ability of adults to communicate with young teenage users are voluntary measures to self-regulate MySpace.com, Plaintiffs' claims that these measures were ineffective are barred as a matter of law.

1. *The CDA Immunizes MySpace from Claims Involving the Online Postings or Offline Conduct of Its Users*

Congress enacted the CDA in 1996 "to promote the continued development of the Internet . . . unfettered by Federal and State regulation."[19] The Act effectuates this aim by encouraging web sites and other "interactive service providers" to create forums for ordinary citizens to publish their thoughts and ideas to the public.[20] In pertinent part, the Act states that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[21] To ensure that web site operators and other interactive computer service providers would not be crippled defending millions of lawsuits involving third-party publications and harms resulting from those publications, the Act provides interactive computer service providers with broad immunity from suit based on such facts.[22] Specifically, section 230(e)(3) of the CDA provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."[23]

---

[19] 47 U.S.C. 230(b)(1) & (2) (2001).

Simply stated, the CDA recognizes the practical impossibility of interactive computer service providers ensuring the safety of its users and the accuracy of every online posting, and to encourage interactive computer services to publish third-party content, it immunizes those services from suits based on third-party content or related tortious conduct. In light of this clearly articulated policy, courts have broadly construed the CDA's protections, even in situations involving reprehensible conduct by third-party users of interactive computer services.[24] *Carafano v. Metrosplash.com, Inc.*, a Ninth Circuit case involving the on-line dating site Matchmaker.com, is a seminal case interpreting the Act.[25] In *Carafano*, an unidentified third-party posted a false on-line personal ad portraying Christine Carafano, a popular television and film actress, to be a sexually promiscuous woman in search of sexual partners.[26] Shortly after the ad was posted, Ms. Carafano began receiving sexually explicit phone calls, letters, and hand-delivered notes to her home. The messages were so threatening and disturbing that Carafano went into hiding for months.[27]

---

[20] *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122-24 (9th Cir. 2003); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997); *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir. 2003); *Prickett v. InfoUSA, Inc.*, No. 4:05-CV-10, 2006 WL 887431, at *4 - *5 (E.D. Tex. Mar. 30, 2006).

[21] 47 U.S.C. 230(c)(1).

[22] *See Dimeo v. Max*, 433 F. Supp. 2d 523, 528 (E.D. Pa. 2006) ("The provision 'precludes courts from entertaining claims that would place a computer service provider in a publisher's role,' and therefore bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone, or alter content.'") (quoting *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d. Cir. 2003) and *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

[23] 47 U.S.C. § 230(e)(3).

[24] *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (noting "the consensus developing across other courts of appeals that § 230(c) provides broad immunity for publishing content provided

When Carafano learned of the ad, she sued Matchmaker.com for negligence and other causes of action. Despite the seriousness of her ordeal, however, the Ninth Circuit affirmed the dismissal of Carafano's suit, explaining that under Section 230(c) of the CDA, "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity."[28] The Court held that Matchmaker.com was immune from liability for any injury she suffered as a result of that posting because the post was made by a third-party user of the Matchmaker.com dating service, and if Matchmaker.com were charged with ensuring that each of the postings on its site were "safe" or otherwise problem free, it is unlikely that the site would be viable.[29] The court supported its conclusion in light of the CDA's policy aims of encouraging the free flow of information over the Internet:

---

primarily by third parties."); *Batzel v. Smith*, 333 F.3d 1018, 1030-32 (9th Cir. 2003); *Green*, 318 F.3d at 470-71; *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000); *Zeran*, 129 F.3d at 328-29.

[25] 339 F.3d 1119 (9th Cir. 2003).

[26] *Id.* at 1121.

[27] *Id.* at 1122.

[28] *Id.* at 1124.

[29] *Id.* at 1124-25.

> Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.[30]

Thus, as the Ninth Circuit recognized, holding the web site liable for its users' content and related offline conduct would fundamentally change the face of the Internet. To encourage the continued exchange of ideas over the Internet, the CDA's immunity provision has been broadly applied.

The CDA's immunity applies in this case despite Plaintiffs' allegation that MySpace was on notice of prior criminal incidents involving MySpace users, as demonstrated by the Fourth Circuit Court's decision in *Zeran v. America Online, Inc.*[31] In *Zeran*, the victim of a vicious prank sued America Online, Inc. ("AOL") for failing to remove from its bulletin board a defamatory post that caused scores of people to harass and threaten him at his home.[32] The posting in *Zeran* was a false advertisement for t-shirts featuring tasteless slogans relating to the 1995 bombing of the Oklahoma City Federal Building.[33] The ad, which was posted just days after the bombing, instructed interested buyers to call the plaintiff, Zeran, to place an order. Zeran began receiving death threats from people who were enraged by the ad. Soon after receiving those calls, Zeran learned of the prank and immediately telephoned AOL demanding that it remove the ad from its bulletin board and that it post a retraction. But despite Zeran's pleas, AOL failed to remove the original ad, and it allowed the unidentified poster to post several subsequent ads.[34] A local radio station learned of the ads and exacerbated Zeran's ordeal by encouraging its listeners to harass him. The volume and intensity of threats that Zeran received became so severe that local police had to guard his home for weeks.[35]

---

[30] *Id.* at 1123-24.

[31] 129 F.3d 327 (4th Cir. 1997).

[32] *Id.* at 329.

[33] *Id.*

Zeran sued AOL for negligence on the grounds that it failed to remove the ad after specific notice of its falsity and that it allowed the third party to post additional ads after it was put on notice of Zeran's harassment and bodily danger. But despite the serious nature of the threats and AOL's failure to retract the ad when notified, the district judge dismissed Zeran's claim on the pleadings, holding that the CDA immunized AOL from causes of action based on its posting of information provided by a third party. The Fourth Circuit affirmed, noting that by enacting the CDA, Congress intended to protect and encourage the free flow of information over the Internet.[36] The Court further explained that the CDA necessarily protects service providers from liability even after they are notified of an allegedly defamatory or threatening post because of the impossible legal burden providers would face if such notification triggered liability.[37] Thus, since AOL has millions of users who publish millions of posts, the court held that holding it liable even after it is notified of a potentially harmful publication would force service providers

[34] *Id.*

[35] *Id.*

[36] *Id.* at 330 ("The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.") (citing 47 U.S.C. § 230(a)(3)).

[37] *Id.* at 333.

to retract virtually every posting that someone alleged to be harmful. This practice would have a chilling effect on Internet communications in direct contravention to the stated purpose of the CDA.

Finally, other cases make clear that the CDA's immunity applies equally to cases in which the interactive computer service provider attempts to verify the accuracy of its third-party content. In *Prickett v. InfoUSA, Inc.*, the Eastern District of Texas recently considered whether InfoUSA, SBC, and Yahoo could be liable for hosting an online business listing that falsely identified the Prickett family as running an adult lingerie and entertainment business.[38] The listing contained the Pricketts' home telephone number and address, resulting in scores of drunk and belligerent men harassing them at all hours of the night, both over the phone and at their doorstep.[39] The parade of drunken lingerie shoppers caused the Pricketts to fear for their lives and caused a neighbor to notify Child Protective Services, resulting in a humiliating investigation of the Pricketts' fitness as parents.[40] The Prickets sued the service providers who ran the user-generated business listings, arguing that the service providers were responsible for the mess in part because the business listing web sites posted the following assurance about the accuracy of their listings:

> We deliver the utmost quality information, and this is one way we keep track of all the business changes that are happening. We also call every business to verify the information, so you can be assured of the most current and accurate listings.[41]

The court held that despite this representation, the interactive computer service could not be held liable for the third-party posting and resulting offline harassment that the Pricketts endured:

---

[38] No. 4:05-CV-10, 2006 WL 887431 (E.D. Tex. Mar. 30, 2006).

[39] *Id.* at *1.

[40] *Id.*

[41] *Id.* at *3.

> The Plaintiffs are presumably alleging that they were harmed by third party content and that the Defendant is liable for failing to verify the accuracy of the content. "Any such claim by [the Plaintiffs] necessarily treats the [Defendant] as 'publisher' of the content and is therefore barred by § 230." The Plaintiffs' argument that they seek to hold the Defendant liable for its alleged failure to verify the accuracy of the listing does not remove this case from the immunity provided by § 230.[42]

Thus, even though the web sites vouched for the general accuracy of the information found in the third-party postings, the CDA barred the plaintiffs from asserting claims arising from those postings.

The *Carafano*, *Zeran*, and *Prickett* opinions make clear that Plaintiffs' claims against MySpace are preempted and barred by the CDA. Contrary to the assertions in the First Amended Petition, MySpace has no duty to ensure the safety of its over 100 million users; to the contrary, it is immune from claims relating to the online publication or related offline conduct of its users. This result is necessary in light of Congress's policy favoring the free flow of information over the Internet, and this policy acknowledges the practical reality that MySpace cannot prevent its millions of users from ever posting false or offensive content.

2. *The CDA Immunizes MySpace from Claims Involving Its Voluntary Efforts to Restrict Teenagers from Communicating With Unknown Adults*

In addition to encouraging interactive service providers to create new forums for online communication, the CDA encourages service providers to self-regulate the dissemination of harmful or offensive communications over their services.[43] The Act effectuates this aim through its "Good Samaritan" provision, which grants immunity to service providers for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[44] That is, Congress recognized that service providers would face a disincentive to implement safety features and exercise editorial control of their webpages if plaintiffs could seek to hold them liable for failing to effectively implement their voluntary safety features. Because Plaintiffs' First Amended Petition seeks to do just that – hold MySpace liable for alleged shortcomings in its voluntary safety features – its claims are barred by the CDA.

---

[42] *Id.* at *5 (citations omitted).

[43] *See Ben Ezra*, 206 F.3d at 986 ("Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions"); *Zeran*, 129 F.3d. at 331 (4th Cir. 1997) (in enacting § 230, Congress sought "to encourage service providers to self-regulate the dissemination of offensive material over their services" and to remove disincentives to self-regulation); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) (holding that § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions); 141 Cong. Rec. H8460-01, H8470 (1995) (statement of Rep. Barton) (Congress enacted § 230 to give interactive service providers "a reasonable way to . . . help them self-regulate themselves without penalty of law").

In particular, Plaintiffs complain about the effectiveness of MySpace safety features that protect young teens from receiving electronic mail messages from adults have not affirmatively accepted as a "friend."[45] Among the many safety features built into MySpace.com are features that restrict adult users from browsing for or messaging MySpace users between the ages of 14 and 15. These users' profiles are automatically set to private, which limits the information publicly available on that user's profile and prohibits users who are not in the teen-user's friends network from sending private message or instant messages to the young teen.[46] The only communication that an unknown adult can send to a private profile is a friend request or invitation. But Plaintiffs charge in paragraphs 26 through 29 of their First Amended Petition that these security measures are not enough. In particular they argue that the measures were ineffective because Julie Doe was able to create a MySpace profile when she was 13 years old by misrepresenting herself to be an adult. Similarly, Plaintiffs complain that Pete Solis, a 19 year-old, was able to contact Julie Doe via MySpace despite the fact that she was allegedly 14 years old at the time. Because Julie Doe misrepresented her age, she did not benefit from the safety features that would have been applied to her account if she had honestly reported her birth date.

---

[44] 47 U.S.C. 230(c)(2)(A).

[45] *See* First Am. Pet. at ¶¶ 11, 16, 26-29.

[46] *See* Exhibit D, Julia Angwin & Brian Steinberg, *News Corp. Goal: Make MySpace Safer for Teens*, Wall St. J., Feb. 17, 2006, at B1; Exhibit G, Jessi Hempel, *From MySpace to Safer Place?*, Business Week, April 11, 2006.

Putting aside the injustice of holding MySpace liable for harms resulting from Julie Doe's misrepresentation, these are precisely the types of claims that are barred by the CDA's "Good Samaritan" provision. The above-mentioned safety features are purely voluntary measures taken by MySpace to restrict access to its younger users' profiles. Indeed, there is nothing illegal about adults e-mailing or otherwise communicating with teenagers online, and there is no requirement under the law that web sites prohibit adults from using their services to e-mail teenagers. Nor is there a requirement under the law that web sites verify the age of their users. In fact, as the United States Supreme Court held in *Reno v. ACLU*, online age verification is impossible and ineffective, and requiring age verification of adult web sites would violate the First Amendment as it would be an overly restrictive prohibition on protected speech.[47] Thus, because MySpace's efforts to restrict access to its younger users' profiles are completely voluntary, the CDA bars claims seeking to hold them liable for the effectiveness or ineffectiveness of those efforts

The Third Circuit's opinion in *Green v. America Online (AOL)*, demonstrates that the CDA bars Plaintiffs' attempt to hold MySpace on these grounds.[48] The plaintiff in *Green* was an AOL subscriber who sued AOL for harassment he endured from other users while using AOL's online "chat rooms."[49] Green alleged that various AOL chat room users harmed him by infecting his computer with virus-like computer programs through AOL chat services.[50] Green also alleged that various users defamed him, and that despite reporting this harassment to AOL, it did nothing to protect him.[51] Among the various bases for his claims against AOL, Green argued that AOL could not benefit from the CDA's immunity provision because AOL's "Community Guidelines," the user agreement that sets forth the terms and standards for online speech over AOL, "contain promises that AOL would protect Green from other subscribers."[52] The district court, however, considered the entirety of the AOL Community Guidelines, and noted that

---

[47] *Reno v. ACLU*, 521 U.S. 844, 855-57 (1997); *see also American Booksellers Found. v. Dean*, 342 F. 3d 96, 99 (2d Cir. 2003) (noting that Internet age verification technology has not changed substantially since the Supreme Court's decision in *Reno v. ACLU*).

[48] 318 F.3d 465 (3d Cir. 2003).

[49] *Id.* at 465-66.

> [T]he Member Agreement between the parties tracks the provisions of section 230 and provides that AOL 'does not assume any responsibility' for content provided by third parties. Though AOL reserved the right to remove messages deemed not in compliance with the Community Guidelines, it expressly disclaimed liability for failure or delay in removing such messages.[53]

Accordingly, the district court granted AOL's motion to dismiss, concluding that AOL made no false representation and actually complied with the Member Agreement. The Third Circuit affirmed the district court, noting that the CDA's "Good Samaritan" provision precluded Green from suing AOL for its failure to effectively implement its voluntary safety features: "Section 230(c)(2) . . . allows AOL to establish standards of decency without risking liability for doing so. Accordingly, the District Court properly dismissed Green's tort claims as barred by § 230."[54]

There is, therefore, no question that Plaintiffs cannot assert claims against MySpace for allegedly failing to properly execute its safety features. Like the AOL Member Agreement in the *Green* case, the MySpace Terms of Use Agreement tracks the language of the CDA, stating among other disclaimers that "MySpace assumes no responsibility for monitoring the Services for inappropriate Content or conduct."[55] Furthermore, the MySpace policies Plaintiffs challenge are voluntary measures taken in good faith for the purpose of protecting MySpace users. For 14 and 15 year-old users who honestly represent their birth dates, these measures restrict access to their profiles and prevent adult users from sending them unsolicited e-mail and instant messages unless they are in the teen-user's friends network. If MySpace, however, were subject to suit by users who misrepresent their ages for the purpose of avoiding these protections or for gaining unauthorized access to the website, the clear incentive from the Court would be for MySpace to abandon its safety measures. This is precisely the result that the CDA seeks to avoid by immunizing MySpace from such baseless suits. Accordingly, Plaintiffs have not stated a cause of action against MySpace.

---

[50] *Id.* at 469.

[51] *Id.*

[52] *Id.* at 471.

[53] *Id.*

[54] *Id.* at 472.

B. Under Texas Law, MySpace Has No Duty to Prevent Third Parties from Committing Crimes

Statutory immunity aside, Plaintiffs' First Amended Petition fails to state a claim for negligence and gross negligence by MySpace under Texas common law. The elements of those causes of action include a legal duty and a breach of that duty.[56] Contrary to Plaintiffs' assertions, MySpace had no legal duty "to institute and enforce" security measures that would substantially decrease the likelihood that Julie Doe would be assaulted by an alleged criminal.[57] Under Texas law, MySpace had no duty to prevent Pete Solis from committing a criminal act.

---

[55] Exhibit A, MySpace Terms of Use Agreement, May 1, 2006, at § 7.1.

[56] *Western Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005); *Coastal Transport. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 231 (Tex. 2004).

[57] *See* First Am. Pet. at ¶ 46.

The Texas Supreme Court has repeatedly stated that a person generally "has no legal duty to protect another from the criminal acts of a third person."[58] Exceptions to this rule are limited to cases where a special relationship between the defendants imposes a duty upon the third-party defendant to control the actor's conduct. The only relationships recognized by Texas courts as giving rise such a duty are those between (1) "employer and employee," (2) "parent and child," and (3) "independent contractor and contractee under special circumstances."[59]

Plaintiffs have alleged no such relationship between MySpace and Pete Solis, nor could they. Pete Solis is merely one of millions of people who have posted an online user profile on the MySpace social networking web site. The alleged criminal event happened offline, and there is no allegation that MySpace was in control of the premises where the crime occurred. There is no special relationship giving MySpace control over Pete Solis or Julie Doe, and accordingly, Plaintiffs have not, and cannot, state a negligence or gross negligence claim against MySpace based on Pete Solis's alleged sexual assault. MySpace had no legal duty to prevent Pete Solis from committing the alleged sexual assault.

C. The Alleged Sexual Assault Was a "New and Independent Cause" of Plaintiffs' Injuries

According to the First Amended Petition, Julie Doe exchanged phone numbers with Pete Solis after exchanging friend requests with him on MySpace.com. Following the exchange of telephone numbers, there were telephone conversations that took place outside of MySpace.com. Julie Doe and Pete Solis agreed over the phone to go out on a date. They then met, and went to dinner and a movie. None of this was illegal. At the end of the date, there was an alleged sexual encounter resulting in criminal charges against Pete Solis. The fact that Pete Solis's alleged criminal conduct occurred at the end of the date defeats the proximate cause element of Plaintiffs' tort claims.

---

[58] *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996); *accord Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) ("Generally, there is no duty to control the conduct of third persons."); *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983) ("As a general rule, one person is under no duty to control the conduct of another, Restatement (Second) of Torts § 315 (1965), even if he has the practical ability to exercise such control.").

[59] *See Phillips*, 801 S.W.2d at 525; *cf. Walker*, 924 S.W.2d at 377 ("Similarly, a landowner has no duty to prevent criminal acts of third parties who are not under the landowner's supervision or control.").

Under Texas law, Pete Solis's alleged sexual assault constitutes a "new and independent cause" of Plaintiffs' injuries. "A 'new and independent cause' is defined as an act or omission of a separate and independent agency that destroys the causal connection between the negligent act or omission of the defendant and the injury complained of, and thereby becomes the immediate cause of such injury."[60] Texas courts typically consider the criminal conduct of a third party to be a new and independent cause relieving an alleged negligent actor from liability.[61] Therefore, Plaintiffs have failed to state the proximate cause element of their tort claims.

D. Plaintiffs Cannot Claim to Have Relied on Prior Representations that Contradict the Unambiguous Terms of the MySpace.com Terms of Use Agreement

Plaintiffs' fraud, fraud by nondisclosure, and negligent misrepresentation claims all share the common element of justifiable reliance.[62] Plaintiffs' First Amended Petition, however, pleads facts demonstrating that Julie Doe cannot have justifiably relied on MySpace's alleged misrepresentations. Despite Plaintiffs' allegation that MySpace misrepresented the safety of its web site and particularly its capacity to verify the age and identity of its users, the MySpace Terms of Use Agreement, which Plaintiffs cite as a basis for their misrepresentation claim,[63] expressly states that MySpace does not review the content of its users' profiles on its web site and disclaims any warranty as to the safety or accuracy of its users' content.[64] Julie Doe necessarily agreed to the provisions of the Terms of Use Agreement as consideration for the privilege to use MySpace.com, and she is bound by its terms. Accordingly, the Plaintiffs cannot, as a matter of law, assert fraud or negligent misrepresentation based on allegations that are directly contradicted by the Terms of Use Agreement.

---

[60] *Rodriguez v. Moerbe*, 963 S.W.2d 808, 820 (Tex. App. – San Antonio 1998, pet. denied).

[61] *Id.*

[62] *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997) ("At the outset, we recognize that the fraud, fraudulent concealment, negligent misrepresentation, and express warranty claims all share the common element of reliance."); *Harrison v. Bass Enters. Prod. Co.*, 888 S.W.2d 532, 536 (Tex. App.—Corpus Christi 1994, no writ).

[63] *See* First. Am. Pet. at ¶ 27.

Texas courts have consistently held that claims of negligent misrepresentation and fraud are insupportable in the face of the unambiguous terms of a contract.[65] In *Airborne Freight Corp. v. C.R. Lee Enterprises, Inc.*, the court reversed a jury verdict award on negligent misrepresentation and fraud claims because the misrepresentation contradicted the express terms of the parties' contract.[66] The plaintiff, C.R. Lee Enterprises ("Lee"), contracted with Airborne Freight Corporation ("Airborne") to offer delivery services to Airborne customers in the Houston area.[67] Although the contract allowed Airborne to terminate Lee on thirty day's notice and disclaimed any assurances as to the duration of the contract, Airborne told Lee that it would not lose its contract "as long as [it] did [its] job."[68] Approximately one year after making this assurance, however, Airborne terminated its agreement with Lee. Lee then sued Airborne for breach of contract, fraud, and negligent misrepresentation. Although Lee lost on its breach of contract claim, the jury awarded over $1 million for its misrepresentation claims.

---

[64] Exhibit A, MySpace Terms of Use Agreement, May 1, 2006, at §§ 7.1 & 7.2.

[65] *C & A Invs., Inc. v. Bonnet Resources Corp.*, 959 S.W.2d 258, 263-64 (Tex. App.—Dallas 1997, writ denied); *Fisher Controls Int'l, Inc. v. Gibbons*, 911 S.W.2d 135, 142 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Bluebonnet Sav. Bank, F.S.B. v. Grayridge Apartment Homes, Inc.*, 907 S.W.2d 904, 907-10 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Airborne Freight Corp. v. C.R. Lee Enters., Inc.*, 847 S.W.2d 289, 295 & 297-98 (Tex. App.—El Paso 1992, writ denied); *see also Rice v. Omnitrition Int'l, Inc.*, No. 05-98-01634-CV, 2001 WL 717853, at *4 (Tex. App.—Dallas June 27, 2001, no pet.) (not designated for publication) 2001 WL 717853, at *4 ("A party cannot rely on oral representations to override the specific language of a written contract and extend the length of the Contract.").

[66] *Airborne Freight*, 847 S.W.2d at 295 & 297-98.

[67] *Id.* at 291.

[68] *Id.* at 292.

The court of appeals reversed and entered a take nothing verdict. Because the contract granted Airborne the right to terminate with thirty day's notice, the court held that Lee could not have justifiably believed that its contract would continue indefinitely.[69] As the court explained, the parties had a "binding written agreement" whose terms "simply belie any reliance on [Airborne's] verbal assurance" that the contract would continue indefinitely.[70] Because Lee could not have justifiably relied on Airborne's assurances, its claim for negligent misrepresentation failed as a matter of law.

Like Lee's claim in *Airborne Freight*, Plaintiffs' claims of fraud and negligent misrepresentation are belied by the express terms of the MySpace Terms of Use Agreement. Plaintiffs' expressly incorporate the MySpace Terms of Use Agreement in their First Amended Petition, and they cite it as a basis for their representation-based claims. A casual reading of the Terms of Use Agreement, however, reveals the absurdity of Plaintiffs' representation-based claims. Far from making any guarantees about the age or identity of MySpace users or blanket statements about the safety of the site, the Terms of Use Agreement warns users of the possibility of content that may "threaten the safety" of other users, urges users to exercise caution when using the site, and makes clear that it does not warrant the accuracy of user content and that user profiles may contain false or offensive content. Specifically the Terms of Use Agreement warns as follows:

---

[69] *Id.* at 297-98.

[70] *Id.*

> Please choose carefully the information you post on MySpace.com and that you provide to other Users. Your MySpace.com profile may not include the following items: telephone numbers, street addresses, last names, and any photographs containing nudity, or obscene, lewd, excessively violent, harassing, sexually explicit or otherwise objectionable subject matter. *Despite this prohibition, information provided by other MySpace.com Members (for instance, in their Profile) may contain inaccurate, inappropriate, offensive or sexually explicit material, products or services, and MySpace.com assumes no responsibility or liability for this material.* If you become aware of misuse of the Services by any person, please contact MySpace or click on the "Report Inappropriate Content" link at the bottom of any MySpace.com page.[71]
>
> . . .
>
> MySpace.com may delete any Content that in the sole judgment of MySpace.com violates this Agreement or which may be offensive, illegal or violate the rights, harm, or threaten the safety of any person. *MySpace.com assumes no responsibility for monitoring the Services for inappropriate Content or conduct.* If at any time MySpace.com chooses, in its sole discretion, to monitor the Services, MySpace.com nonetheless assumes no responsibility for the Content, no obligation to modify or remove any inappropriate Content, and no responsibility for the conduct of the User submitting any such Content.
>
> . . .
>
> You are solely responsible for the Content that you post on or through any of the Services, and any material or information that you transmit to other Members and for your interactions with other Users. MySpace.com does not endorse and has no control over the Content. *Content is not necessarily reviewed by MySpace.com prior to posting and does not necessarily reflect the opinions or policies of MySpace.com. MySpace.com makes no warranties, express or implied, as to the Content or to the accuracy and reliability of the Content or any material or information that you transmit to other Members.*[72]

Plaintiffs' claims of fraud and negligent misrepresentation are also undermined by the express terms of the MySpace "Tips for Parents," which Plaintiffs also incorporate in their First Amended Petition, and cite as a basis for their representation-based claims. The warning of the Tips for Parents page also definitively show that Plaintiffs cannot claim to have justifiably relied on any statement that MySpace is unconditionally safe for young users or that MySpace verifies the age or identity of its users:

---

[71] Exhibit A, MySpace Terms of Use Agreement, May 1, 2006, cited and incorporated by reference in First Am. Pet. at ¶ 27 (emphasis added).

[72] *Id.* at §§ 7.1 & 7.2 (emphasis added).

> As a parent, please consider the following guidelines to help your children make safe decisions about using online communities.
>
> . . .
>
> Kids shouldn't lie about how old they are. MySpace members must be 14 years of age or older. *We take extra precautions to protect our younger members and we are not able to do so if they do not identify themselves as such.* MySpace will delete users whom we find to be younger than 14, or those misrepresenting their age.
>
> . . .
>
> *People aren't always who they say they are.* Ask your children to be careful about adding strangers to their friends list. It's fun to connect with new MySpace friends from all over the world, but members should be cautious when communicating with people they don't know. They should talk to you if they want to meet an online friend in person, and if you think it's safe, any meeting should take place in public and with friends or a trusted adult present.[73]

Thus, Plaintiffs' have failed to plead reasonable reliance on MySpace's alleged representation that it verifies the age and identity of its users or that the site is safe for younger users who disregard MySpace safety precautions. The very Terms of Use Agreement and Tips for Parents that Plaintiffs cite as evidence of these alleged misrepresentations make clear that "people aren't always who they say they are" and that MySpace is not able to protect its 14 and 15 year-old members if they lie about their age.

Aside from the overwhelming evidence that there is no misrepresentation in this case, Texas law expressly precludes parties from claiming to have justifiably relied on statements so clearly contrary to the terms of a contract. That is, even if MySpace had misrepresented the safety of its site (which it clearly did not), Plaintiffs have failed to state a viable representation-based claim because the Terms of Use Agreement directly contradicts each alleged misrepresentation they allege. The Court should therefore grant these special exceptions, as Plaintiffs' have failed to state claims for fraud, fraud by nondisclosure, or negligent misrepresentation.

---

[73] Exhibit C, MySpace Tips for Parents, cited and incorporated by reference in First Am. Pet. at ¶ 27 (emphasis added).

III.
CONCLUSION

For the foregoing reasons, MySpace requests that the Court sustain its special exceptions and strike Plaintiffs' First Amended Petition, dismissing all claims asserted against MySpace. The Communications Decency Act of 1996 bars precisely the types of claims that Plaintiffs attempt to assert against MySpace. But well before the CDA was enacted, principles of Texas common law precluded Plaintiffs from holding one party liable for the criminal acts of another and from claiming to have relied on an alleged misrepresentation that is directly contrary to the terms of a contract between the plaintiff and defendant. These legal principles present fatal legal defects in Plaintiffs' claims against MySpace, and given that Plaintiffs have already attempted to replead, this case is now ripe for dismissal.

Respectfully submitted,

VINSON & ELKINS L.L.P.

Michael D. Marin

Michael D. Marin
State Bar No. 00791174
Susan Denmon Gusky
State Bar No. 00787609
Christopher V. Popov
State Bar No. 24032960
2801 Via Fortuna, Suite 100
Austin, Texas 78746
(512) 542-8549
(512) 236-3410 (Facsimile)

ATTORNEYS FOR MYSPACE, INC. AND NEWS CORPORATION

CERTIFICATE OF SERVICE

A copy of the foregoing instrument was served on the following parties and counsel on September 1, 2006.

Via Hand Delivery and Certified Mail
Adam J. Loewy — *Counsel for Plaintiffs*
Carl R. Barry
Barry & Loewy, LLP
One Congress Plaza
111 Congress Avenue, Suite 400
Austin, Texas 78701
(800) 892-5044 (phone)
(512) 370-3173 (fax)

Via Certified Mail
Kurt B. Arnold — *Counsel for Plaintiffs*
Jason A. Itkin
Arnold & Itkin LLP
700 Louisiana Street, Suite 4700
Houston, Texas 77002
(713) 222-3800 (phone)
(713) 658-0674 (fax)

Via First Class Mail
Adam Reposa — *Counsel for Defendant Pete I. Solis*
603 W. 17th Street
Austin, Texas 78701
(512) 476-0444 (phone)
(512) 236.1313 (fax)

Via First Class Mail
Pete I. Solis
160 Calderon
Buda, Texas 78610

Michael D. Marin